

NEW SECTION. Change authorization for instream flow – United States Department of Agriculture, Forest Service. (1) The department shall accept and process an application by the United States Department of Agriculture, Forest Service for a change in appropriation right under the provisions of 85-2-402, and this section, to protect, maintain or enhance streamflows to benefit the fishery or other resources on National Forest System Lands. As used in this section, National Forest System Lands is as defined in [Forest Service Compact, Article I (8)]. The United States Department of Agriculture, Forest Service must own the appropriation right it seeks to change under this section, the diversion or withdrawal must be located within or immediately adjacent to the exterior boundaries of National Forest System Lands as of the date provided in [Forest Service Compact, Article IV.B.2.], and the stream reach in which the streamflow is to be protected, maintained or enhanced must be located within or immediately adjacent to the exterior boundaries of National Forest System Lands as of the date provided in [Forest Service Compact, Article IV.B.2.] The application must:

(a) include specific information on the length and location of the stream reach in which the streamflow is to be protected, maintained or enhanced; and

(b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.

(2) In addition to the requirements of 85-2-402, the applicant for a change authorization under this section shall prove by a preponderance of evidence that:

(a) the change authorization for water to protect, maintain and enhance streamflows to benefit the fishery or other resources, as measured at a specific point, will not adversely affect the water rights of other persons; and

(b) the amount of water for the proposed use is needed to protect, maintain or enhance streamflows to benefit the fishery or other resources.

(3) The department shall approve the method of measurement of the water to protect, maintain and enhance streamflows to benefit the fishery or other resources through a change authorization as provided in this section.

(4) The department is not responsible for costs associated with installing devices or providing personnel to measure streamflows according to the measurement plan submitted under this section.

(5) The priority of appropriation for a change in appropriation right is the same as the priority of appropriation of the right that is changed.

(6) A change authorization under this section does not create a right of access across private property or allow any infringement of private property rights.

(7) The maximum quantity of water that may be changed to protect, maintain and enhance streamflows to benefit the fishery or other resources is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the change authorization, may be used to protect, maintain or enhance streamflows to benefit the fishery or other resources below the existing point of diversion.

(8) The Department may modify or revoke the change in appropriation right up to 10 years after it is approved if an appropriator, with a priority of appropriation before the change in appropriation right was granted, submits new evidence not available at the time the change in appropriation right was approved that proves by a preponderance of evidence that the appropriator's water right is adversely affected.